

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Division of Administrative Law Judges  
San Francisco, CA

KAVA HOLDINGS, LLC, et al., d/b/a  
HOTEL BEL AIR,

Respondent,

and

Case 31-CA-074675

UNITE HERE LOCAL 11,

Charging Party.

To the Honorable Lisa D. Thompson (Ross)  
Administrative Law Judge

**CHARGING PARTY UNITE HERE LOCAL 11'S POST-HEARING BRIEF**

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## Table of Contents

Table of Authorities .....	v
I. INTRODUCTION.....	1
II. FACTS.....	1
A. Background on the relationship between the Union and Respondent .....	1
B. Renovation of the Hotel Bel-Air .....	3
1. Changes to physical layout and structure .....	3
2. New technology .....	3
3. Wolfgang Puck restaurant.....	4
4. Continuity in job duties from the old to the renovated Hotel .....	4
C. Structure of the July 2011 hiring fair.....	5
1. Organizers of the hiring fair.....	5
2. Special period for former employee applicants .....	5
3. Training for managers .....	5
4. Structure of the hiring fair process.....	6
D. Hiring fair inconsistencies and problems.....	8
1. Problems at the Initial Conversation stage .....	8
a. “Poor communication skills” used to reject long-time former employee applicants.....	8
b. Former employees who received positive Initial Conversation evaluations, but no Departmental Interview .....	10
2. Problems at the Departmental Interview stage .....	10
a. Summary and arbitrary rejections of former employee applicants by Andrey Godzhik .....	10
b. Other summary rejections of former employee candidates .....	12
c. Inconsistent standards and their selective application to former employee applicants by Wolfgang Puck interviewers.....	12
i. Work experience.....	12
ii. Specificity of answers to interview questions.....	13
iii. Completeness of application forms.....	13
3. Additional problems with the hiring fair .....	14
a. Delays between stages and reversals of rejections .....	14

b.	Irregular use of interview forms .....	15
c.	Inconsistent understanding of the significance of prior work experience at the Hotel .....	16
E.	Respondent unilaterally modified employees' terms and conditions of employment upon the reopening of the Hotel .....	17
III.	ANALYSIS .....	18
A.	The Respondent violated Sections 8(a)(5) and (1) of the Act by failing and refusing to recognize the Union as the Section 9(a) representative of its employees upon resuming its operations, and making unilateral changes to terms and conditions of employment. ....	18
B.	The Respondent violated Sections 8(a)(3) and (1) of the Act by discriminating against its former employees during the rehire of its workforce. ....	20
1.	Legal Standard .....	20
2.	The Respondent was actively hiring employees in preparing for the resumption of its operation at the remodeled Hotel Bel-Air in 2011. ....	22
3.	Former employees who applied for their job positions at the remodeled Hotel Bel-Air possessed experience and training relevant to the announced or generally known requirements of those positions. ....	22
a.	Former Hotel Bel-Air employee applicants had demonstrated competency in their job positions for years and possessed strong work records. ....	22
b.	The job requirements for bargaining unit classifications at the Hotel Bel-Air remained essentially unchanged following the renovation. ....	24
4.	Antiunion animus contributed to the Respondent's decision not to rehire the majority of its former employees. ....	25
a.	Respondent's animus against former employees and the Union is evidenced by its prior unfair labor practices, wherein it sought to obtain waivers of former employees' reinstatement rights. ....	26
b.	Direct evidence of Respondent's antiunion animus was established at hearing. ....	27
c.	Respondent's animus is evidenced by the dramatic statistical disparity in its hiring of former employees. ....	29
d.	Respondent's pretextual hiring fair presents numerous inconsistencies and problems which demonstrate bias against former employees. ....	30
i.	Special Interview Period for Former Employees. ....	30
ii.	Initial Conversations. ....	30
iii.	Departmental Interviews. ....	32
iv.	Additional problems with the hiring fair. ....	34

5.	The Respondent has failed to show that it would not have hired former employee applicants even in the absence of animus against them.....	35
IV.	CONCLUSION.....	36

## Table of Authorities

### Board Cases

<i>Adams &amp; Associates</i> , 2015 NLRB LEXIS 463 .....	21
<i>ADS Electric Co.</i> , 339 NLRB 1020 (2003).....	25
<i>Affiliated Foods, Inc.</i> , 328 NLRB 1107 (1999).....	25
<i>Doug Wilson Enterprises, Inc.</i> , 334 NLRB No. 51 (2001).....	35
<i>FES and Plumbers</i> , 331 NLRB 9 (2000) .....	20, 21
<i>Glenn's Trucking Co.</i> , 332 NLRB 880 (2000) .....	29
<i>Greenbrier Rail Services</i> , 364 NLRB No. 30 (2016) .....	20, 21, 25
<i>Hotel Bel-Air</i> , 358 NLRB 1527 (2012).....	1, 2, 3, 26
<i>Hotel Bel-Air</i> , 361 NLRB 898 (2014).....	2, 3
<i>J. S. Troup Electric</i> , 344 NLRB 1009 (2005).....	25
<i>JAMCO</i> , 294 NLRB 896 (1989).....	25
<i>Lucky Service Company</i> , 292 NLRB 1159 (1989) .....	35
<i>Mason City Dressed Beef, Inc.</i> , 231 NLRB 735 (1977) .....	20
<i>Montgomery Ward</i> , 316 NLRB 1248 (1995) .....	25
<i>Naomi Knitting Plant</i> , 328 NLRB 1279 (1999) .....	25
<i>Network Dynamics Cabling, Inc.</i> , 341 NLRB. 735 (2004).....	35
<i>Northfield Urgent Care, LLC &amp; Jennifer Grossman</i> , 358 NLRB No. 17 (Mar. 15, 2012) .....	26
<i>Planned Building Services</i> , 347 NLRB 670 (2006).....	21
<i>Richardson Bros. South</i> , 312 NLRB 534 (1993).....	25
<i>Roadway Express</i> , 327 NLRB 25 (1998).....	25
<i>St. Margaret Mercy Healthcare Centers</i> , 350 NLRB 203 (2007).....	26
<i>Transp. Solutions</i> , 2007 NLRB LEXIS 287.....	20
<i>Waste Management of Arizona</i> , 345 NLRB 1339 (2005).....	26
<i>Wright Line</i> , 251 NLRB 1083 (1980).....	25

### Federal Cases

<i>Golden Day Schools v. NLRB</i> , 644 F.2d 834 (9th Cir. 1981) .....	25
<i>Hotel Bel-Air v. NLRB</i> , 637 Fed.Appx. 4 (D.C. Cir. 2016) .....	2, 3
<i>Mid-Mountain Foods, Inc.</i> , 332 NLRB 251 (2000).....	25
<i>N.L.R.B. v. Burns International Security Services, Inc.</i> , 406 U.S. 272 (1972) .....	20

<i>NLRB v. Noel Canning</i> , 134 S.Ct. 2550 (2014).....	3
<i>NLRB v. Rain-Ware, Inc.</i> , 732 F.2d 1349 (7th Cir. 1984) .....	25
<i>NLRB v. Vemco, Inc.</i> , 989 F.2d 1468 (6th Cir. 1993).....	25
<i>Shattuck Denn Mining Corp. v. NLRB</i> , 362 F.2d 466 (9th Cir. 1966).....	25

## **I. INTRODUCTION**

The instant case concerns violations of §§ 8(a)(3), (5) and (1) of the Act committed by Respondent Kava Holding d/b/a Hotel Bel-Air (“Respondent”) in 2011. In September 2009, Respondent closed the Hotel Bel-Air (“Hotel”) for renovation and remodeling, laid off all employees, and engaged in negotiations with its employees’ § 9(a) collective bargaining representative, UNITE HERE Local 11 (“Union”), regarding the impact of the closure and renovation on bargaining unit members. In July 2010, Respondent unilaterally implemented its severance offer, in an effort to obtain waivers of reinstatement rights directly from employees. The Union immediately filed an unfair labor practice charge, and the Board subsequently determined that Respondent’s unilateral action violated §§ 8(a)(5) and (1) of the Act. *Hotel Bel-Air*, 358 NLRB 1527, 1530 (2012), adopted by *Hotel Bel-Air*, 361 NLRB 898 (2014), *enfd.* *Hotel Bel-Air v. NLRB*, 637 Fed.Appx. 4 (D.C. Cir. 2016).<sup>1</sup>

Undeterred by the legal challenge to its brazen attempt to rid itself of its former workforce and their Union, Respondent set out to achieve its aim by other equally unlawful means. With the remodeled Hotel Bel-Air scheduled to open in October 2011, Respondent conducted a three-day hiring fair in late July. Of the 176 former employees who applied for positions at the renovated Hotel, Respondent hired a mere 24, based on evident antiunion animus. Upon resuming its operations, Respondent refused to recognize or bargain with the Union, and unilaterally established new terms and conditions of employment for its workforce, repudiating the parties’ expired collective bargaining agreement.

The Respondent’s foregoing conduct at issue in the instant case is a renewed violation of §§ 8(a)(3), (5) and (1) of the Act.

## **II. FACTS**

### **A. Background on the relationship between the Union and Respondent**

Prior to 2009, employees at Hotel Bel-Air (“Respondent”) were represented by UNITE HERE Local 11 (“Union”), and Respondent and the Union were party to a series of collective bargaining agreements, the most recent of which was in effect from August 16, 2006 to

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<sup>1</sup> The Administrative Law Judge in this case has taken administrative notice of the prior Hotel Bel-Air case (Case 31-CA-029841) as potential evidence of Respondent’s anti-Union animus. Tr. 2704 [Judge Thompson]; *Hotel Bel-Air*, 361 NLRB 898 (2014), *enfd.* *Hotel Bel-Air v. NLRB*, 637 Fed.Appx. 4 (D.C. Cir. 2016) (adopting and incorporating by reference *Hotel Bel-Air*, 358 NLRB 1527 (2012), and the Administrative Law Judge’s rulings, findings, and conclusions set forth therein).

September 30, 2009, and covered workers in kitchen, dining room/room service, banquet service, garage, front office, housekeeping, guest services, stewarding, purchasing and receiving, property operations and maintenance, and amenity classifications. (GC Ex. 3.)<sup>2</sup>

On July 31, 2009, Respondent notified the Union that it would close for renovations on September 30, 2009 and offered to bargain over the effects of the closure on bargaining unit employees.<sup>3</sup> *Hotel Bel-Air*, 358 NLRB 1527, 1530 (2012), *adopted by Hotel Bel-Air*, 361 NLRB 898 (2014), *enfd. Hotel Bel-Air v. NLRB*, 637 Fed.Appx. 4 (D.C. Cir. 2016). The parties met for bargaining and exchanged proposals throughout the next year. Key issues for negotiations included the right of bargaining unit employees to return to their positions upon reopening and the terms of any severance package offered to employees. *Id.* By June 2010, the parties were making substantial progress toward reaching an agreement and continued to meet and exchange proposals. However, on July 7, 2010, Respondent unilaterally, and without notice to the Union, implemented its “last, best, and final offer” from April 9, 2010 and sent severance packets and waiver and release forms to each employee. Approximately 179 employees signed the waiver and release, forfeiting their reinstatement rights. *Id.* at 1532. The Board held that Respondent violated the Act when it sent the severance, waiver, and release to employees, by unilaterally implementing its proposal in the absence of valid impasse, and dealing directly with employees in the absence of impasse. *Id.* at 1533.

Because Respondent’s September 2009 closure for renovations was a temporary closure, employees laid off “retained a reasonable expectation of recall.” *Id.* at 1528. The Board explained that “[u]nder the terms of [the July 7 severance] offer, employees who accepted a severance payment *waived their recall rights*. Thus, the Respondent’s own offer took it for granted that unit employees had some expectation of recall.” *Id.* (emphasis original). Respondent’s willingness to break the law to secure waivers of reinstatement rights from as many bargaining unit employees as possible evinced a desire to purge its former workforce with the objective of reopening the Hotel free of the obligation to recognize and bargain with the

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<sup>2</sup> References to the official record of the hearing in this matter shall be designated as follows: (1) “Tr.”: Transcript; (2) “GC Ex.”: Counsel for the General Counsel Exhibit; (3) “CP Ex.”: Charging Party Exhibit; (4) “R Ex.”: Respondent Exhibit.

<sup>3</sup> The Administrative Law Judge in this case has taken administrative notice of the prior *Hotel Bel-Air* case (Case 31-CA-029841) as potential evidence of Respondent’s anti-Union animus. Tr. 2704 [Judge Thompson]; *Hotel Bel-Air*, 361 NLRB 898 (2014), *enfd. Hotel Bel-Air v. NLRB*, 637 Fed.Appx. 4 (D.C. Cir. 2016) (adopting and incorporating by reference *Hotel Bel-Air*, 358 NLRB 1527 (2012), and the Administrative Law Judge’s rulings, findings, and conclusions set forth therein).

Union. Around the same time, the Union engaged in protected activity at the Beverly Hills Hotel, also owned and operated by the same hospitality group as the Hotel Bel-Air, the Dorchester Collection.

Respondent appealed the Administrative Law Judge's August 12, 2011 decision to the Board, which affirmed on September 27, 2012. *Hotel Bel-Air*, 358 NLRB 1527 (2012). Respondent then filed for a petition for review in the D.C. Circuit, which vacated and remanded the decision in light of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). On remand on October 31, 2014, the Board affirmed and adopted the ALJ and Board's decision in 358 NLRB 1527 (2012). *Hotel Bel-Air*, 361 NLRB 898 (2014). On March 8, 2016, the D.C. Circuit denied Respondent's second petition for review and granted the Board's application for enforcement of its order. *Hotel Bel-Air v. NLRB*, 637 Fed.Appx. 4 (D.C. Cir. 2016).

## **B. Renovation of the Hotel Bel-Air**

Meanwhile, Respondent was preparing the Hotel for its reopening in October 14, 2011. (Tr. 1825 [Lai]; 2388 [Sweetman].) While Respondent characterized the remodeled Hotel Bel-Air as being entirely different from the pre-closure Hotel (Tr. 1666 [Boggs]), the Hotel remained, at its core, the same five-star luxury hotel that it was prior to the renovation. Most critically, employees' job duties remained essentially identical at the updated Hotel.

### **1. Changes to physical layout and structure**

The remodeling resulted in some additions and modifications to the physical layout of the Hotel. These changes included a new spa, expanded restaurant area, an updated bar, the addition of a fire pit and more tables in the lobby area, and about a dozen additional guest rooms. (Tr. 1669-71 [Boggs].) Cosmetic changes were effected to the existing buildings, which Respondent seeks to characterize as a "stark difference between the old hotel and the new hotel." (Tr. 2561 [Moje].) These cosmetic changes included, for example, differences in interior decorations, and chrome instead of brass bathtubs inside the guest rooms. (Tr. 2006, 2021-22 [Luc].)

### **2. New technology**

A number of new technological features were also introduced into the Hotel. At the front desk, the reopened Hotel began using tablets with credit card readers during the guest check-in process. (Tr. 1674-77 [Boggs].) In the guest rooms, touchscreen tablets were also introduced for both guests and housekeeping employees. Guests now used a tablet to request room service, turn

on and off the lights, and control the air conditioning, and housekeepers used a tablet with an updated computer system for tracking their work. (Tr. 2006-07 [Luc].)

### **3. Wolfgang Puck restaurant**

The Wolfgang Puck organization was engaged by the Respondent to license and operate the Hotel restaurant post-remodeling. The Wolfgang Puck restaurant and the old restaurant differed primarily in the quality of the ingredients, the use of fresh rather than prepared products, and the level of care put into kitchen processes. (Tr. 2403-05 [Sweetman].) Although these changes may have raised the quality of the food, they did not fundamentally alter the job duties and qualifications of food and beverage department employees.

### **4. Continuity in job duties from the old to the renovated Hotel**

These changes illustrate that although the remodeled Hotel Bel-Air may have enhanced the guest experience, they did not actually require different skill sets from Hotel staff. The pre-closure Hotel Bel-Air was already a world-famous, historic hotel that hosted celebrities and other noteworthy guests. (Tr. 1699-1701 [Boggs].) It was, and continues to be, part of the Dorchester Collection, a company that owns and manages nine elite, luxury hotels in locations around the world. The Hotel had a five-star rating before and after the remodeling—a rating only achievable with employees who have the requisite emotional intelligence to provide detailed, personalized guest service. (Tr. 1668 [Boggs].)

The fundamental similarity in job duties and qualifications is supported by the Hotel's job descriptions, job classifications, and the testimony of current employees who also worked at the Hotel prior to its closure. Most job categories at the pre- and post-remodeled Hotel are also the same. (GC Ex. 9; GC Ex. 10.) Nearly all of the job descriptions provided by Respondent for the same positions at the pre- and post-remodeled Hotel are identical. (GC Ex. 9; GC Ex. 10; Tr. 1718-26 [Boggs].) A current housekeeping department supervisor, who worked in the department prior to the renovations, testified that the core duties of room attendants had not changed: to change beds and linens, clean floors, clean surfaces, clean bathrooms, and restock towels, soaps, and amenities. (Tr. 2016-19 [Luc].) Although room attendants at the new Hotel are required to use a touchscreen tablet for some maintenance and service requests, a former manager of the Hotel Bel-Air testified that workers can be trained on technical aspects of the job. (Tr. 1727-28 [Boggs].)

## **C. Structure of the July 2011 hiring fair**

### **1. Organizers of the hiring fair**

In advance of the reopening of the remodeled Hotel in 2011, Respondent conducted a hiring fair, planned by Eva White (then Director of Human Resources at the Beverly Hills Hotel), Sandra Arbizu (then Human Resources Manager at the Hotel Bel-Air), and Maria “Milet” Lukey (then Area Director of Human Resources for the Beverly Hills Hotel and the Hotel Bel-Air). (Tr. 510 [Lukey].) Ms. Lukey was hired as Area Director in July 2011 and was the top staff member in charge of organizing the hiring fair. Ms. Arbizu, under the direction of Mr. White, Ms. Lukey, and Tim Lee (then General Manager of the Hotel Bel-Air) was also tasked with determining how the hiring fair would be run. (Tr. 1862-63 [Arbizu].) Tim Lee was also involved in organizing the hiring fair. (Tr. 1864 [Arbizu].) The organizers of the hiring fair determined how to process the applicants, where the hiring fair would take place, the extent of managers’ involvement, what interview questions would be asked, and how interviewers would be trained. (Tr. 508-10 [Lukey]; 1862-63 [Arbizu].)

### **2. Special period for former employee applicants**

The hiring fair lasted for three days and took place from July 26-28, 2011. (Tr. 516-17 [Lukey]; GC Ex. 13.) Respondent witnesses testified that former union membership was not to be considered by managers, or asked of applicants. (Tr. 542 [Lukey]; 1881 [Arbizu].) Ms. Lukey stated that “there was no intent to find out . . . the status of any of the former employees.” (Tr. 581 [Lukey].) Nonetheless, Respondent sent a letter to all former employees of the Hotel Bel-Air instructing them to attend the first day of the hiring fair on July 26 from 9:00 a.m. to 12:30 p.m., so that they would be grouped together. The rest of the time for the hiring fair was set aside for “[a]pplications for the general public.” (GC Ex. 13.) Hiring fair organizers also decided to use an English-only application form, providing a potential justification for excluding applicants who were not able to proficiently read and write in English. (Tr. 1865 [Arbizu].)

### **3. Training for managers**

The organizers conducted a training session for all of the managers involved in the hiring fair. (Tr. 565 [Lukey]; 2255-56 [Camaal].) The training covered what the Hotel was looking for in applicants during the hiring process. (R Ex. 65; Tr. 2255-56 [Camaal].) Managers involved in the planning and execution of the hiring fair were aware of the labor dispute between the Hotel

Bel-Air and the Union at the time of the fair. (Tr. 1905 [Arbizu]; 1710, 1714 [Boggs]; 1772-73 [Oken].)

Ms. Arbizu also described a training that was held for managers as a part of the reopening process, which she described as a “preventative kind of work that we do to educate our managers so that your employees do not need a third party to speak for them.” (Tr. 1906-07 [Arbizu].) Notably, a schedule of the reopening process produced by Respondent lists a “union action plan” as a task to be completed prior to the Hotel’s reopening. (GC Ex. 56 p. 4.)

#### **4. Structure of the hiring fair process**

The hiring fair was structured such that applicants would pass through three separate interview stages before being given a job offer: an Initial Conversation, a Departmental Interview, and a Final Interview. (Tr. 528-33 [Lukey].) At each stage, the interviewer, who was a manager of the Hotel Bel-Air or the Beverly Hills Hotel, or another Dorchester Collection human resources manager, was supposed to have discretion to reject the applicant or move the applicant on to the next stage of the process. (Tr. 528-33 [Lukey]; R Ex. 5.) However, human resources staff were also involved throughout the entire process, controlling the interview and application forms before and after interviews. (Tr. 1865, 1912 [Arbizu]; 2090 [Luevano]; 2327-28 [Rangel].)

The first stage was the Initial Conversation (“IC”), also referred to as the “screening.” Managers who conducted ICs were instructed to complete the section labeled “Initial Conversation” on the interview form. (Tr. 528-29, 532 [Lukey]; 2070 [Luevano]; R Ex. 50 p. 1.) During this stage, managers were supposed to ask only the questions listed in this section of the form, which were: “What position are you applying for?”, “Are you available to work weekends/holidays?”, and “Why do you want to work at Hotel Bel-Air?” (Tr. 829 [Lukey]; R Ex. 50 p. 1.) The IC was ostensibly intended to assess the applicant’s personality. (Tr. 1866-67 [Arbizu].) However, technical aspects of job qualifications were sometimes also discussed. (Tr. 1869 [Arbizu].) Many former Hotel Bel-Air employee applicants at the hiring fair also told the interviewer about their previous experience working at the hotel. (*See e.g.*, GC Ex. 2 p. 41, 481, 497.)

These initial interviews were extremely brief: one former employee applicant who had worked at the Hotel Bel-Air for 22 years described it as lasting mere “seconds” (Tr. 953, 961-62 [Escobar]), and another 21-year former employee testified that he felt the IC “wasn’t right,” and

that it was “too quick.” (Tr. 1126, 1136 [del Real].) But immediately following these short conversations, the IC interviewers decided whether or not to recommend the applicant for the next stage of the hiring fair interview process. For the applicants they wanted to move forward, the interviewers would place their interview form and job application in the “yes” box; for applicants they wanted to reject, the “no” box. (Tr. 1776-77 [Oken]; 1867 [Arbizu].) The “yes” applications were collected by a human resources manager, such as Ms. Lukey, and placed in a “holding area.” (Tr. 1912 [Arbizu]; 2090 [Luevano].) They were later given to the department heads who served as interviewers in the next stage of the hiring fair process. These managers had discretion to choose which applicants, out of those passed on to them, they would interview; some chose to interview every applicant. (Tr. 1912 [Arbizu], 2304 [Rangel], 2398-99 [Sweetman].)

This second stage was the Departmental Interview (“DI”). DI interviewers were generally department heads or other supervisors, and would ask questions from and complete the “Departmental Interview” section of the interview form. (R Ex. 50; Tr. 532-33 [Lukey].) During these interviews, managers were supposed to consider an applicant’s technical skills, experience, references, and work history. (Tr. 1868 [Arbizu].) DI interviewers understood themselves to have sole discretion to decide whether an applicant would be referred for a final interview or would be rejected. (Tr. 2305 [Rangel]; 2399 [Sweetman].) If a DI interviewer rejected a candidate, they were supposed to be removed from the process. (Tr. 2324 [Rangel].) The applications and interview forms of rejected applicants were passed on to human resources staff (Tr. 2327-28 [Rangel].)

The last stage was the Final Interview (“FI”), which were mostly conducted by Christoph Moje, who had been hired as the Hotel Manager (a different position from General Manager) of the Hotel Bel-Air in July 2011. These interviews mostly took place in a set of trailers across the street from the Hotel Bel-Air after the hiring fair and continued through at least October 2011. (Tr. 2563 [Moje].) Mr. Moje interviewed every applicant that was presented to him by human resources staff, and he made his decision to hire or reject the applicant immediately after the interview. (Tr. 2564-65 [Moje].) The FI interviewer was to ask the applicant the questions listed in, and complete, the “Final Interview” section of the interview form. (GC Ex. 2; Tr. 533 [Lukey].)

In order to avoid the appearance of discrimination against former employee applicants, Respondent decided not to have Tim Lee, then General Manager of the Hotel, conduct these interviews. As Ms. Arbizu explained, “there was the idea that he would be able to say no to someone because they had worked there prior because he was [the] prior . . . general manager . . . So they wanted to take that element out so that the person who was making the final decision was somebody who had no idea if this individual had worked for . . . the hotel before . . .” (Tr. 1894 [Arbizu].)

#### **D. Hiring fair inconsistencies and problems**

At the time of the hiring fair, Respondent was hiring for about 306 open positions at the Hotel Bel-Air, in every department of the Hotel. Out of the 176 applicants who were former employees of the Hotel before its temporary closure in September 2009, only 24 were offered positions at the Hotel when it reopened. (Tr. 536-41 [Lukey].) The former employee applicants who were rejected were qualified for the open positions, and many had positive evaluations over the years that they had worked at the Hotel. (GC Ex. 29.) These included former employees Irma Zavala, Juan Pablo Contreras Torres, Amanda Escobar, and Pablo del Real, all of whom had positive work histories. Some of the rejected former employee applicants had worked at the Hotel for 20 years or longer. (*See, e.g.*, GC Ex. 2 pp. 141-44, 145-48, 254-57, 441-44, 481-84.)

Out of the 176 former employee applicants, at least 64 (36%) were not given a Departmental Interview. (GC Ex. 2.) Out of the 64 former employee applicants dismissed at this stage, around 42 (65%) had worked at the Hotel for 5 years or more; around 29 (45%) had at least 10 years of tenure.

The following sections detail some of the inconsistencies and problems in the hiring fair process. A chart listing and summarizing the applications discussed below, as well as other applications not addressed here, is included as Appendix A to the Charging Party’s Brief.

#### **1. Problems at the Initial Conversation stage**

##### **a. “Poor communication skills” used to reject long-time former employee applicants**

At the Initial Conversation stage, “poor communication skills” was frequently used as a justification for eliminating former employee applicants. For example, Amanda Escobar worked for 22 years as a housekeeper at the Hotel Bel-Air, before she was laid off when the Hotel closed for renovations. (Tr. 953-54 [Escobar].) She one of the few housekeepers chosen to work at

times as a substitute supervisor. (Tr. 972-76 [Escobar].) Guests would specifically request Ms. Escobar's services "[a]lmost all the time." (Tr. 968 [Escobar].) One particular guest appreciated Ms. Escobar's work so much that she referred her for private housekeeping employment outside of the Hotel. (Tr. 971 [Escobar].) Ms. Escobar applied to work at the remodeled Hotel at the hiring fair, during the time set aside for former employee applicants. (Tr. 958-59 [Escobar].) She was given an initial interview, which lasted "[s]econds." (Tr. 962 [Escobar].) The interviewer marked Ms. Escobar as having "poor communication skills." (GC Ex. 2 pp. 497-98.) Ms. Escobar did not receive a Departmental Interview and was not rehired. (*Id.*)

Despite having worked at the Hotel for 27 years, applicant Joaquin Fuentes was rejected by Respondent, with a marking for "lack hospitality/communication skills" in the DI section of the form. There are no initials on his interview form indicating that Mr. Fuentes received a Departmental Interview. Ms. Arbizu conducted his IC and testified that she did not know if that marking was hers, though it was made in a style consistent with Ms. Arbizu's other markings. (Tr. 1913-14 [Arbizu]; GC Ex. 2 pp. 441-42.)

Similarly, Jose Gaeta, a 23-year former busser at the Hotel applying for a busser position, was interviewed by Ms. Arbizu at the IC stage and was marked for: "poor communication skills," "did not always understand questions; unclear answers," and "lack hospitality/communication skills." As on the interview form for Joaquin Fuentes, there are no initials indicating that Mr. Gaeta received a DI, but there is a marking in that section of the form consistent with those made by Ms. Arbizu. (Tr. 1920-21 [Arbizu]; GC Ex. 2 pp. 76-77.) Another 23-year worker, Martin Orozco, also interviewed by Ms. Arbizu at the IC stage, was similarly rejected with the "lack hospitality/communication skills" box checked. (Tr. 1922-25 [Arbizu]; GC Ex. 2 pp. 319-20.)

These were just a few of the long-time former employee applicants rejected at the IC stage due to alleged problems with their communication skills. (*See* Appendix A.) Because many of these former employees held positions that did not involve guest interaction, like busser, engineer, or room attendant, it is possible they spoke English as their second language, but this fact evidently did not prevent them from successfully performing their jobs prior to the renovation of the Hotel.

**b. Former employees who received positive Initial Conversation evaluations, but no Departmental Interview**

Many former employee applicants received a completely positive evaluation by their IC interviewer, yet for unexplained reasons were not given a Departmental Interview. For example, Carmen Casiano (20-year worker), Irma Zavala (20-year worker), Ana Arrazola (13-year worker), and Carlos Burgos (16-year worker), were all interviewed by Khoi Evans Luevano, a manager who participated in the hiring fair, at the IC stage. (Tr. 1071-86 [Luevano]; GC Ex. 2, pp. 254-57, 481-84, 489-92, 109-12.) All four had uniformly positive marks in the IC part of the interview form, but none of them appear to have received a Departmental Interview. When asked if Mr. Burgos was someone she would have placed in the “yes” box to recommend him for a DI, Ms. Luevano said that he was. (Tr. 2083 [Luevano].) Despite having high marks for the positive personality traits Respondent claimed to be seeking at the IC stage, these former employees’ applications did not proceed further after being collected by human resources staff. (Tr. 581-83 [Lukey]; Tr. 1912 [Arbizu].)

**2. Problems at the Departmental Interview stage**

The Departmental Interview stage was riddled with even more inconsistencies and inexplicable rejections of former employee applicants, which created in effect a second filter by which former employees were eliminated from consideration. On the interview forms of around 94 former employee applicants, a DI interview’s initials or name is listed. (GC Ex. 2.) As explained below, it is not clear how many of these 94 applicants actually received a DI, because around 40 of these interview forms list only a DI interviewer’s initials and a marking in one of the boxes indicating the reason for rejection in the “Remove from Consideration” column, with no other parts of the form, such as the applicant’s responses to the DI interview questions, filled out.

**a. Summary and arbitrary rejections of former employee applicants by Andrey Godzhik**

The DI interviewer responsible for the greatest number of summary rejections was Andrey Godzhik, then a manager at the Hotel restaurant. Respondent did not call him to testify at trial. Of the former employee applicants who have a DI interviewer’s initials or name written on their form, Mr. Godzhik appears on a plurality (around 37) of them. Out of these, he rejected 31 former employee applicants. (GC Ex. 2.) Because a large number of the forms bearing Mr. Godzhik’s initials do not contain any writing except for a marking in the “Remove from

Consideration” column, it is not clear whether or not he actually interviewed these candidates or if this was his method of rejecting applicants that had been recommended to him by the Initial Conversation interviewers.

However, it is readily apparent that Mr. Godzhik’s indicated reasons for rejecting many former employee applicants were contradicted by the applicants’ qualifications and prior evaluation by their IC interviewer. For example, Emilio Molina, who had worked at the Hotel for 30 years prior to its closing, received a completely positive evaluation during his IC. The interviewer marked that Mr. Molina “expressed and spoke clearly,” and that he “appeared self-assured/showed confidence.” (GC Ex. 2 p. 141.) This applicant was passed on by the IC interviewer to the DI stage, since Mr. Godzhik’s initials are written in the DI section of the form. However, despite the positive evaluation of the IC interviewer, Mr. Godzhik recommended that Mr. Molina be removed from consideration, simply marking “lack hospitality/communication skills.” (GC Ex. 2 p. 142.)<sup>4</sup> Mr. Godzhik rejected the application of Joseph Nava, another long-time former employee, in exactly the same way. (GC Ex. 2 pp. 221-22.)

Mr. Godzhik also rejected other former employee applicants for similarly arbitrary reasons. Tomas Alvarado had worked at the Hotel for 25 years—from 1984 until its closing in 2009. (GC Ex. 2 pp. 145-46.) Milet Lukey served as his IC interviewer and gave him a uniformly positive evaluation. The DI section of the interview form, however, has only two markings: Mr. Godzhik’s initials and a marking in the “Remove from Consideration” column indicating “unacceptable job stability” on the part of Mr. Alvarado. As with the applications of Mr. Molina and Mr. Nava discussed above, it is not apparent from the interview form whether Mr. Godzhik actually interviewed Mr. Alvarado, and Mr. Godzhik was not called to testify at trial. In either circumstance, however, a rejection for a lack of job stability was inconsistent with Mr. Alvarado’s history of working for one employer for 25 years. Mr. Godzhik also rejected Oscar Martinez, another former employee applicant who had worked at the Hotel for 10 years, and Elizabeth Bono, a 12-year former employee, in the same manner. (GC Ex. 2 pp. 113-16; 373-76.)

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<sup>4</sup> If Mr. Godzhik actually interviewed Mr. Molina, according to the Respondent’s protocol he should have written down Mr. Molina’s answers to the interview questions, giving some indications as to why his evaluation of Mr. Molina was so different from that of the IC interviewer. If Mr. Godzhik did not interview Mr. Molina, then he would not have been able to surmise that Mr. Molina had problems with his hospitality or communication skills.

**b. Other summary rejections of former employee candidates**

Mr. Godzhik was not the only DI interviewer who rejected former employee applicants for inexplicable reasons. Julio Cruz had worked as a banquet server at the Hotel for 22 years and applied at the hiring fair for the same position. He received a positive evaluation during his IC, but Tracey Spillane, a Wolfgang Puck staff member and his DI interviewer, marked “basic experience, training needed,” and Mr. Cruz was not moved on to the next stage in the interview process. (GC Ex. 2 pp. 54-57.) When asked about this evaluation of Mr. Cruz’s 22 years of experience as a banquet server, Ms. Spillane responded simply that “[e]veryone needed training.” (Tr. 1979 [Spillane].) Roberto Dominguez, another former employee applicant who received a very positive IC evaluation, was summarily rejected by his DI interviewer in the same way that Mr. Godzhik rejected Emilio Molina and Joseph Nava—with nothing more than a mark for “lack hospitality/communication skills.” (GC Ex. 2 pp. 41-42.)

**c. Inconsistent standards and their selective application to former employee applicants by Wolfgang Puck interviewers**

Department heads in charge of interviewing candidates for the Hotel’s Wolfgang Puck-licensed food and beverage operations gave contradictory testimony about attributes they were looking for. Tracey Spillane, one of the DI interviewers from Wolfgang Puck, testified that for her, an individual’s experience and qualifications were “secondary” to someone’s “bright enthusiasm and sense of hospitality.” (Tr. 1971 [Spillane].) She described the training process for new food and beverage employees as “fundamentally kind of start from scratch and build for someday to become successful.” (Tr. 1971-72 [Spillane].) On the other hand, Edward “Sonny” Sweetman, who was then the Executive Chef of the Hotel, emphasized that he was looking for “best qualified” candidates with the “best background.” (Tr. 2406 [Sweetman].) Inconsistencies between interviewers and disparities in how interviewers treated former and non-former employee applicants further served to eliminate qualified former employees from consideration.

**i. Work experience**

DI interviewers gave selective and inconsistent weight to employees’ work experience. Anthony Pham was a former employee applicant who had a degree from Le Cordon Bleu, a culinary school. (R Ex. 40; R Ex. 47; Tr. 2486 [Sweetman].) Mr. Sweetman did not record any of Mr. Pham’s responses to the DI questions, only writing the number “1” on the application (a code for failing to meet minimum qualifications and skills and experience required for the

position). (Tr. 2486 [Sweetman].) Mr. Sweetman explained that “[h]aving a degree from a culinary school and having a work history are two different things.” (Tr. 2487 [Sweetman].)

In contrast, Mr. Sweetman hired Yesenia Gonzalez, a non-former employee who had no kitchen work experience. (GC Ex. 2 pp. 1195-98.) She answered Mr. Sweetman’s questions during the interview using examples from her work at Walgreens, the retail pharmacy. Mr. Sweetman acknowledged that she had no kitchen work history at the time she applied for the job, but that she was hired in part because she had been to culinary school. (Tr. 2504 [Sweetman].)

## **ii. Specificity of answers to interview questions**

DI interviewers were also inconsistent in the importance they assigned to the quality and specificity of the answers that applicants gave in response to interview questions. Mr. Sweetman testified that with respect to Jaime Bravo, a former employee applicant, his answers to the DI questions were not detailed enough, and that he was looking for “specific examples,” not a “general answer.” (R Ex. 82; Tr. 2483-84 [Sweetman].) Mr. Sweetman rejected Mr. Bravo’s application at this stage.

Mr. Sweetman did, however, advance to the Final Interview phase two non-former employee applicants who gave simplistic answers to questions. When asked for an example of a time she helped a guest with a question or problem, Chau Nguyen answered “providing info about food,” and Mr. Sweetman found that to be a sufficient response to recommend her to the next stage in the hiring process. (GC Ex. 2 pp. 817-18; Tr. 2500 [Sweetman].) Sidue Dukemajian, another non-former employee, answered the same question with “[a] guest wanted a banana so she sent it to the guest room.” Mr. Sweetman recommended that she be advanced to the next stage. (GC Ex. 2 pp. 731-32; Tr. 2489-90 [Sweetman].)

## **iii. Completeness of application forms**

DI interviewers also relied on the incompleteness of application forms as a selective justification for rejecting former employee applicants. Pedro Sanchez was rejected by Mr. Sweetman in part because Mr. Sanchez did not check off any of the boxes in the “Can work” section of the application form, where applicants were supposed to indicate their availability. When asked if it mattered to him that that part of the form was incomplete, Mr. Sweetman replied, “Exactness always matters.” (Tr. 2436-37 [Sweetman]; R Ex. 46; R Ex. 39.) Ronald Harling, another former employee, was also eliminated due to an “incomplete application” even

though his application was complete except for the section listing professional references. (GC Ex. 2 pp. 578-81.)

By contrast, non-former employee applicants with incomplete applications were still hired. Maria Peralta did not list any professional references on her application, but she was given a job offer. (R Ex. 62 p. 2; Tr. 2127-28 [Peralta].) Julio Aleocer, another non-former employee, did not fill in his education background, the date he could begin work, the days he was available to work, or professional references. He was also offered a job at the Hotel. (Tr. 2616-18 [Moje]; R Ex. 48; R Ex. 49.) Mr. Sweetman also conducted the DI and Final Interview for Jesus Jacobo, another non-former employee who was hired despite not providing professional references on his job application form. (GC Ex. 2 pp. 1283-86.)

### **3. Additional problems with the hiring fair**

#### **a. Delays between stages and reversals of rejections**

Finally, a number of other problematic practices and contradictions tainted the hiring fair process as a whole. First, some employees received invitations for Departmental Interviews after a significant amount of time had passed since the hiring fair. For example, Eluterio Urbina was a former employee applicant who was ultimately rehired by Respondent. His IC interview took place at the hiring fair on July 26, 2011. (GC Ex. 2 pp. 568-69.) However, he only received a call from the Respondent about a week later, asking him to go to the trailers in the parking lot of the Hotel for his DI. (Tr. 2136 [Urbina].) Andrey Godzhik interviewed Mr. Urbina on August 5, 2011, eight days after the end of the hiring fair. Mr. Godzhik actually wrote down the answers to Mr. Urbina's responses to the interview questions, unlike the interview forms of numerous former employee applicants whom he summarily rejected. On August 12, 2011, Mr. Urbina was given a Final Interview with Christoph Moje, and was subsequently extended a job offer. (GC Ex. 2 pp. 568-69.)

This practice of deferring decisions on interviews and job offers until after the end of the hiring fair, or even modifying prior decisions after the fact, gave Respondent an additional opportunity to control the number and percentage of former employees rehired. An example of the latter approach is presented by Respondent's convoluted hiring of Lucinda Landers. Ms. Landers was a former employee applicant who conducted her DI with Andrey Godzhik. Mr. Godzhik indicated two different reasons for rejecting her: "Lack hospitality/communication skills" and "Does not possess minimum experience/skills requirements." (GC Ex. 2 pp. 359-60.)

Despite having been ostensibly rejected by Mr. Godzhik, Ms. Landers subsequently received a call from Respondent in August asking her to come in for a Final Interview with Christoph Moje on August 10, 2011. (Tr. 2226-27 [Landers].)

Another similar example is former employee applicant Maria Torres. Andrey Godzhik's initials are written in the "Departmental Interview" section of the form, along with a marking next to "lack hospitality/communication skills." (GC Ex. 2 pp. 175-76.) This was consistent with how Mr. Godzhik filled out the interview forms of many other applicants he summarily rejected. It appears that Maria Bonomo, a former manager of the housekeeping department and another DI interviewer, later interviewed Ms. Torres on August 24, 2011, around a month after the hiring fair. Ms. Torres was advanced to the Final Interview and was extended a job offer on August 24, 2011. (*Id.*) Ms. Torres's application was removed from consideration in a manner similar to Andrey Godzhik's rejection of many other candidates, but was revived a month later for unknown reasons.

#### **b. Irregular use of interview forms**

Second, interviewers utilized the interview forms in a variety of ways that were contrary to the putative system in place. As discussed above, Andrey Godzhik's practice of writing his initials in the DI section and checking off a reason (often an arbitrary one) for removing an applicant from consideration, without recording anything else on the form, such as the date of the interview and answers to interview questions, contradicts Respondent's account of how interviewers consistently marked their forms, and makes it impossible to now determine (in the absence of his testimony) which of the rejected applicants he actually interviewed.

In addition, IC interviewers made markings in the DI section of the form to justify rejecting applicants at the IC stage, again contradicting Respondent's account of interviewers' practice. A number of forms completed by Louise Drohan at the IC stage have no DI interview, but contain markings in the DI section under the "Remove from Consideration" column in the same style as Ms. Drohan's markings in the IC section. Former employee applicants rejected in this way include Maria del Cid, Amanda Escobar, Higinio Castellon, and Maria Lourdes Nolasco. (GC Ex. 2 pp. 477-78, 497-98, 237-38, 627-28.) Even Sandra Arbizu, one of the architects of the hiring fair process, used the forms in this "improper" manner when rejecting former employees Joaquin Fuentes, Jose Pinedo, and Martin Orozco. (GC Ex. 2 pp. 441-42, 270-71, 319-20, Tr. 1926 [Arbizu].)

One interviewer, Sonny Sweetman, used a system of codes for rejecting applicants that no other interviews appear to have used. (Tr. 2412-13 [Sweetman].) Each code corresponded to a reason for why the applicant was removed from consideration. (Tr. 2413-14; 2444 [Sweetman].) Respondent's counsel stated that only Mr. Sweetman utilized these codes, without offering any explanation as to why he was the only interviewer to do so. (Tr. 2666 [Terrell].)

**c. Inconsistent understanding of the significance of prior work experience at the Hotel**

Third, managers involved in the hiring fair generally contradicted one another regarding the significance of prior work experience at the Hotel in evaluating a former employee's qualifications for rehire. Ms. Arbizu implied that long-term experience at the Hotel actually made a candidate less attractive to hire: "[W]hen I was interviewing people and they would say they . . . loved it, they'd been there for 30 years . . . I would think, [a]w, that's so sweet. But I wanted a little bit more . . . [W]e're kind of looking for somebody that's excited about what we're trying to do now, not so much of 27 years that they were with the organization . . ." (Tr. 1936 [Arbizu].)

At the same time, Ms. Arbizu and Milet Lukey stated that the former union status of employees was not considered. (Tr. 542 [Lukey]; 1881 [Arbizu].) Prior human resources files of former employee applicants were not used during the hiring fair. (Tr. 579 [Lukey]; 1864 [Arbizu].) Ms. Lukey, the chief architect of the hiring fair, summarized her understanding of the process:

I believe the mission was to hire exceptional talent, and that meant that it was anybody who would apply, that they would be on the same treatment, if you will, same process that they go through, irregardless of whether or not they were with the Hotel Bel-Air or whether they had experience somewhere else in another property. You know, it was simply based on that process that we have in place. There was no – there was no intent to find out, you know, what the status of any of the former employees. You know, it didn't even come to any discussion at all.

(Tr. 581 [Lukey].)

On the other hand, Maria Rangel, another DI interviewer, testified that she advocated for the employees who had worked for her at the Hotel before it closed. (Tr. 2175 [Rangel].) Her endorsement of former employees was based on her experience working with them. (Tr. 2324-25 [Rangel].) And she acknowledged was equally capable of communicating negative information about her former employees to hiring managers. (Tr. 2425-26 [Rangel].)

These conflicting views among hiring managers reflect a contradiction at the heart of the hiring fair process: ostensibly, managers were not to consider applicants' prior work history at the Hotel, but such experience was obviously relevant to evaluating the strength and qualifications of a candidate. The testimony of Tiffany Lai, who was a manager in the catering department of the Hotel at the time of the hiring fair and served as an IC interviewer, typified management witnesses' struggle to reconcile this contradiction. Ms. Lai confirmed that during her interviews, she was seeking to determine the applicant's ability to work effectively on a team, their service and hospitality skills, and their potential for professional growth. (Tr. 1854 [Lai].) Ms. Lai also agreed that an individual's prior work history would be pertinent to these assessments. (Tr. 1854 [Lai].) But she further testified that she was instructed not to, and did not, consider an applicant's previous work experience when deciding whether or not to move him or her to the next stage of the process. (Tr. 1854-55 [Lai].)

**E. Respondent unilaterally modified employees' terms and conditions of employment upon the reopening of the Hotel**

In advance of reopening, Respondent did not refer to the parties' expired collective bargaining agreement or consult with the Union in setting terms and conditions of employment at the Hotel. Ms. Arbizu testified that during the planning period for the hiring fair, there was no preparations made to bargain with the Union. (Tr. 1908 [Arbizu].) The Respondent established terms and conditions of employment in advance of the reopening, and significantly modified them from the status quo which existed between the parties prior to the Hotel's renovation. (Tr. 1906 [Arbizu].)

Denise Flanders, who served as the Hotel's General Manager from March 2012 to August 2015 and from November 2016 to present, testified that she had never seen the previous CBA. (Tr. 1666-69 [Flanders].) She also confirmed that the Hotel did not, in contravention of the previous CBA, participate in the Union retirement fund, adhere to the previous seniority policy, or follow the previous schedule of rates of pay or vacation policy. (Tr. 1566-78 [Flanders].) Saul Camaal, an in-room dining server who was hired by the Hotel after its reopening in 2011, gave further testimony regarding terms and conditions in effect since the Hotel's reopening. Mr. Camaal testified that his starting salary was \$8.25 per hour, and that he estimated that he had received four raises since then, up to his current \$11.50 per hour wage. (Tr. 2376-77 [Camaal].)

### III. ANALYSIS

#### A. **The Respondent violated Sections 8(a)(5) and (1) of the Act by failing and refusing to recognize the Union as the Section 9(a) representative of its employees upon resuming its operations, and making unilateral changes to terms and conditions of employment.**

In establishing whether an employer's bargaining obligation survives a hiatus in operations, the Board distinguishes between "temporary" and "indefinite" closures, and examines whether employees retained a "reasonable expectancy" of rehire. *Golden State Warriors*, 334 NLRB 651, 653-54 (2001) (remodeling of sports stadium, though it lasted longer than anticipated, did not extinguish union's representative status or employer's bargaining obligation because hiatus was temporary and employees retained reasonable expectancy of rehire: "There remains for consideration the question whether the one-season hiatus in the Respondent's operations at the Arena extinguished the vendors' expectancy of recall and so affected the continuity of the Respondent's collective-bargaining relationship with the Union as to permit unilateral changes and, upon the hiring of a new work force for vending operations, to permit the Respondent's refusal to recognize and bargain with the Union. We agree with the judge that the hiatus did not have this disruptive effect."); *El Torito-La Fiesta Restaurants*, 295 NLRB 493, 494-95 (1989), *enfd.* 929 F.2d 490 (9th Cir. 1991) (temporary closure of restaurant for remodeling did not negate union's representative status or employer's bargaining obligation);<sup>5</sup> *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136 (1990), *enfd.* 942 F.2d 169 (3d Cir. 1991) (lengthy suspension of operations did not relieve employer of bargaining obligation where laid-off employees had "some expectancy of recall"); *Sterling Processing Corp.*, 291 NLRB 208, 210 (1988) (temporary versus indefinite character of hiatus, and employees' reasonable expectancy of rehire, are dispositive of continuing bargaining obligation, and of employer's right to implement new terms and conditions of employment upon reopening).

If a closure is determined to be temporary and employees are found to have a reasonable expectancy of rehire, the union's status as § 9(a) collective bargaining representative and the employer's bargaining obligation are deemed to survive the closure, and continue upon

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<sup>5</sup> The Board's decision in *Golden State Warriors* cited *El-Torito*, noting: "In agreement with the judge, we find that although the *El Torito* Board addressed a contract-bar issue, the distinction drawn between temporary and indefinite, potentially permanent, employer shutdowns is applicable to other situations in which a hiatus in operations is alleged to justify unilateral changes upon the resumption of operations." *Golden State Warriors*, 344 NLRB at 654, fn. 8.

reopening. The employer must respect the pre-closure *status quo* and may not implement new terms and conditions of employment without first bargaining with the union.

Here, the Hotel's hiatus in operations was clearly temporary and employees had a reasonable expectation of rehire. First, Respondent admitted through its conduct that the Hotel's closure was temporary and that employees had recall rights. The right of bargaining unit employees to return to their positions upon reopening was a key issue during negotiations between Respondent and the Union after the Hotel's closure in 2009, making it clear that Respondent planned to resume operations. *Hotel Bel-Air*, 358 NLRB 1527, 1530 (2012).

Second, former employees testified that they expected to return to their positions upon the Hotel's reopening. When asked what her behavior was like during her initial interview, Irma Zavala testified that she was happy because she "had the hope that [she] was going to come back to work" at the Hotel. (Tr. 388 [Zavala].) Juan Pablo Contreras Torres testified that on the day he attended the hiring fair, he had a "new hope that [he] was going to [his] job again." (Tr. 786 [Contreras].) Amanda Escobar testified that during her initial interview she was "very happy" and "was dreaming that [she] was going to recover [her] job." (Tr. 962 [Escobar].)

Finally, in deciding 358 NLRB No. 152, the Board concluded that employees had a reasonable expectation of recall:

Here, by contrast, the unit employees were laid off, not discharged. Moreover, they retained a reasonable expectation of recall from layoff. The Respondent's July 7 severance offer demonstrated as much, even assuming contemplated changes in the hotel's business model made it less than certain that the Respondent would recall all of them. Under the terms of that offer, employees who accepted a severance payment *waived their recall rights*. Thus, the Respondent's own offer took it for granted that unit employees had some expectation of recall.

358 NLRB No. 152, at 2 (emphasis in original) citing *Rockwood Energy & Mineral Corp.*

Respondent set terms and conditions of employment without bargaining with the union. Respondent witnesses testified that there had been no preparations to deal with the Union post-reopening and that it did not currently follow the previous CBA in setting terms and conditions of employment. (*See above*, p. 17.) In addition, a current employee testified that he had received around four raises since his hiring at the time of the Hotel's reopening in 2011. (Tr. 2376-77 [Camaal].)

In sum, there is no doubt that under relevant precedent, the Hotel Bel-Air was not relieved of its bargaining obligations by its temporary closure for renovations, and violated

§§ 8(a)(5) and (1) by refusing to recognize and bargain with the Union and implementing new terms and conditions of employment upon reopening.

**E. The Respondent violated Sections 8(a)(3) and (1) of the Act by discriminating against its former employees during the rehire of its workforce.**

**1. Legal Standard**

The Board has long-recognized that “it is an unfair labor practice for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity under § 8(a)(3) of the NLRA.” *Mason City Dressed Beef, Inc.*, 231 NLRB 735, 745 (1977), citing *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 280-81 (1972) (“Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the Union.”).

The Board set out its standard for evaluating an employer’s discriminatory refusal to hire union members or union supporters in *FES and Plumbers*, 331 NLRB 9 (2000):

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

*Id.* at 12 (internal citation omitted).

The Board and Administrative Law Judges have applied the foregoing standard to cases where an employer refuses to rehire or refuses to consider for rehire its former employees. *See, e.g., Greenbrier Rail Services*, 364 NLRB No. 30 (2016), at 149-50 (“Paragraph 6(d) and (e) alleges that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by refusing to rehire various employees in March 2013. The Board applies the framework set forth in *FES*, 331 NLRB 9 (2000) ... to analyze allegations of discriminatory failures to hire.”); *Transp. Solutions*, 2007 NLRB LEXIS 287 (applying *FES* standard to analyze discriminatory refusal to rehire).

However, in *Greenbrier Rail Services*, the ALJ quickly disposed of the first two prongs of the *FES* standard, emphasizing that former employees were simply re-applying for their jobs: “It is undisputed that the Respondent was hiring in March 2013, and the focus was to rehire

former employees who knew the job and did not need training. The former employees obviously had experience and training relevant to the positions. The General Counsel has thus established the first two elements of the *FES* test.” *Greenbrier, supra*, at 150-51.

Further, the Board has recognized that the General Counsel should not bear the burden of proving the first two elements of the *FES* test in successorship cases, where a successor employer is charged with refusing to rehire the unionized workforce of its predecessor.

Analyzing such a case in *Planned Building Services*, 347 NLRB 670 (2006), the Board held as follows:

Having carefully considered the rationale that prompted the Board to supplement its *Wright Line* standard for refusal-to-hire cases, we find that the same concerns regarding hiring plans and applicants’ qualifications are not ordinarily present where a refusal to hire occurs when an alleged successor employer does not retain employees of the predecessor. Rather, for reasons discussed below, we find a refusal to hire in a successorship context to be analogous to a discriminatory discharge situation, where *FES* has no application.

First, in successorship cases, the predecessor’s employees presumptively meet the successor’s qualifications for hire. Because a successor’s business is generally a continuation of its predecessor’s business, it follows that the predecessor’s employees, if hired by the successor, ordinarily would continue to perform essentially the same type of work as they did for the predecessor. Therefore, it serves no purpose to require the General Counsel to demonstrate, in each successorship case, that the employees have relevant experience or training for essentially the same jobs in the successor’s work force that they performed in the predecessor’s work force.

Second, because a successor employer must fill vacant positions in starting up its business, it is similarly of little use to require the General Counsel to demonstrate that the employer was hiring or had concrete plans to hire.

Thus, we find that these additional elements that the Board added to the General Counsel’s initial burden in *FES* are not appropriately part of the General Counsel’s burden in establishing refusal-to-hire allegations in a successorship setting.

*Planned Building Servs., supra*, at 673-74; see also *Adams & Associates*, 2015 NLRB LEXIS 463, at 25-28 (“In the context of successor avoidance, the General Counsel has the burden to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. *Planned Building Services*, 347 NLRB 670, 73 (2006) (incorporating *Wright Line* and rejecting the analytical framework of *FES* in the successor avoidance context). Once

this is shown, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive.”).

While in the instant case the Respondent did not replace a predecessor employer as its successor, but merely resumed its business operations following a remodeling hiatus, the Board’s reasoning in successorship cases is nonetheless instructive. Similar to a successorship fact pattern, there is no dispute here that the Respondent was seeking to hire qualified employees to staff its remodeled Hotel, and employee reapplicants were presumptively qualified to perform the same jobs they had held for years or decades prior. Hence, though the Respondent’s hiring and the former employees’ extensive qualifications are both evident from the record, the analysis of the Respondent’s unlawful conduct should properly focus on its antiunion animus and discriminatory hiring process, which were clearly established by the evidence presented at Hearing.

**2. The Respondent was actively hiring employees in preparing for the resumption of its operation at the remodeled Hotel Bel-Air in 2011.**

As noted above, there is no factual dispute that the Respondent was hiring to fill positions at the Hotel Bel-Air leading up to the reopening of the Hotel in October 14, 2011 and for some months afterward.

**3. Former employees who applied for their job positions at the remodeled Hotel Bel-Air possessed experience and training relevant to the announced or generally known requirements of those positions.**

As noted above, the General Counsel’s burden of establishing employees’ job qualifications is significantly reduced when, as here, former employees reapply for job positions which they previously held. Nonetheless, the evidentiary record in this case is replete with evidence that former employees possessed experience and training relevant to the announced or generally known requirements for these positions.

**a. Former Hotel Bel-Air employee applicants had demonstrated competency in their job positions for years and possessed strong work records.**

In total, 176 former employees re-applied for their jobs at the Hotel Bel-Air beginning in 2011. Prior to the closure of the Hotel for renovation in 2009, these individuals had been employed at the Hotel in bargaining unit positions, and had successfully performed their jobs prior to their mass lay-off. In many cases, employees had worked at the Hotel for tenures upwards of twenty or thirty years. Prior to the 2009 closure, the Hotel Bel-Air was a premier

five-star luxury property, which maintained exceptional standards of service, and catered to celebrity clientele. (Tr. 1667, 1699 [Boggs].) It is evident that employees, who were subject to close supervision and regular evaluation by the Respondent's managers, would not have remained employed at the Hotel if they had failed to perform their duties effectively.

The General Counsel introduced extensive documentation from former employee applicants' personnel files, including commendations, positive performance reviews, "employee of the month" awards, etc., which attest to their experience, training, and qualifications. (GC Ex. 29.)

At Hearing, a number of former long-service employees with exemplary work records testified regarding their years of experience working at the Hotel Bel-Air prior to its closure for renovation. Irma Zavala worked as a uniform attendant and housekeeper at the Hotel for 20 years, during which time she received a special commendation from the Hotel for finding and returning a very large sum of money from one of her guest rooms, received positive employment evaluations, and was recognized as employee of the month. (Tr. 372-404 [Zavala], GC Ex. 20, 21, 22, 23.) Juan Pablo Contreras Torres worked at the Hotel for five years as a busser, during which time he received specialized training to ensure five-star service and positive performance evaluations from his managers, received no discipline, and observed celebrities such as Nancy Reagan and Oprah visit the Hotel. (Tr. 775-95 [Contreras], GC Ex. 17, 18.) Amanda Escobar worked as a housekeeper at the Hotel for 22 years, during which time she studied English to improve her communication with coworkers and guests, served as an acting supervisor, and befriended a guest named Crystal Minkoff who subsequently hired her as her personal housekeeper and referred her for other employment following the closure of the Hotel. Escobar referred to the Hotel Bel-Air as her "second home" when she reapplied for her job. (Tr. 952-78, GC Ex. 16.) Lastly, Pablo del Real worked at the Hotel for 21 years primarily as a painter, during which time he was assigned to supervise his coworkers based on his experience and knowledge of the job. (Tr. 1125-32 [del Real].)

The foregoing individuals provide a representative sample of the strong work records and extensive experience which were typical among former employee applicants.

**b. The job requirements for bargaining unit classifications at the Hotel Bel-Air remained essentially unchanged following the renovation.**

The Respondent expended considerable effort at Hearing to emphasize the changes which the Hotel Bel-Air underwent as a result of its remodeling. In presenting evidence of these changes, largely through photographs of the renovated Hotel interior, the Respondent evidently sought to demonstrate that its putative improvements to the Hotel's facilities rendered former employees' years and decades of work experience irrelevant to their qualifications to work at the renovated property. (Tr. 1669-79 [Boggs]; R Ex. 17.) However, the Respondent's argument is contradicted by its own witnesses and documentary evidence.

Former Hotel Bel-Air Assistant Manager Steven Boggs, whom the Respondent called to testify about the effects of the renovation, conceded that the Hotel had been rated a five-star hotel prior to the renovation, and did not achieve the same rating immediately upon reopening. (Tr. 1667 [Boggs].) In comparing the Respondent's job descriptions for numerous bargaining unit classifications in departments throughout the Hotel from before and after the renovation, Boggs conceded that the descriptions were substantively identical, and the written job requirements did not change significantly as a result of the renovation. (Tr. 1717-26 [Boggs]; GC Ex. 9, 10.)

Similarly, Respondent witness Mina Thuy Luc, who was employed as a Housekeeping dispatcher at the Hotel Bel-Air prior to its renovation, and has been employed as a Housekeeping supervisor at the Hotel from 2011 to the present, confirmed that the job duties and requirements for Hotel housekeepers remain largely unchanged. (Tr. 2016-19 [Luc].)

Boggs further testified to changes in the Hotel's food and beverage operations as a result of the post-remodeling collaboration between the Hotel and the Wolfgang Puck. (Tr. 1671-72 [Boggs].) However, Boggs noted that this change necessitated specialized training, rather than a distinct set of *a priori* qualifications. (*Id.*) Similarly, Tracey Spillane, a manager for the Wolfgang Puck restaurant group who participated in the Respondent's hiring process in 2011, acknowledged that "everyone needed training" in the Food and Beverage Department upon the Hotel's reopening, irrespective of their work experience and background. (Tr. 1979 [Spillane].) Boggs also noted some additional technological devices and interfaces which were added to the Hotel following its renovation, but again conceded that employees could be trained with respect

to such “technical aspects” of their job, and that the Hotel Bel-Air had provided such training to its employees in the past. (Tr. 1676-78, 1727-28 [Boggs].)

The Respondent failed to rebut the common-sense notion that former employees remained qualified to perform the same jobs they had held prior to the remodeling of the Hotel Bel-Air.

**4. Antiunion animus contributed to the Respondent’s decision not to rehire the majority of its former employees.**

In *Greenbrier Rail Services, supra*, the Board enumerated the various factors which establish an employer’s discriminatory animus in rehire cases: “A discriminatory motive or animus may be established by: (1) the timing of the employer’s adverse action in relationship to the employee’s protected activity; (2) the presence of other unfair labor practices, (3) statements and actions showing the employer’s general and specific animus; (4) the disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer’s proffered explanation for the adverse action is a pretext.” *Greenbrier Rail Services*, 364 NLRB No. 30, at 140-41, citing *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 260 (2000), *enfd. mem.* 11 Fed. Appx. 372, 169 LRRM 2188 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473-74 (6th Cir. 1993); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (statements); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (disparate treatment); *JAMCO*, 294 NLRB 896, 905 (1989), *affd. mem.* 927 F.2d 614 (11th Cir. 1991), *cert. denied* 502 U.S. 814, 112 S. Ct. 66, 116 L. Ed. 2d 41 (1991) (departure from past practice); *Wright Line*, 251 NLRB 1083, 1089 (1980); *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment).

“The Board will infer an unlawful motive or animus where the employer’s action is ‘baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive.’” *Greenbrier* at 141, citing *J. S. Troup Electric*, 344 NLRB 1009 (2005) and *Montgomery Ward*, 316 NLRB 1248, 1253 (1995); *see also ADS Electric Co.*, 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

In the instant case, Respondent’s animus towards former employees is evidenced by: 1) its prior unlawful effort to obtain waivers of reinstatement rights from former employees in violation of §8(a)(5) of the Act; 2) the direct evidence of antiunion animus in the hiring process established at Hearing through Respondent’s witnesses and documentation; 3) the statistical

disparity between the large number of qualified former employees who applied for their prior jobs, and the small number hired by the Respondent; and 4) the clearly pretextual nature of the “neutral” hiring fair conducted by the Respondent, which was riddled with inconsistencies and bias against former employee applicants.

**a. Respondent’s animus against former employees and the Union is evidenced by its prior unfair labor practices, wherein it sought to obtain waivers of former employees’ reinstatement rights.**

A “pattern of unfair labor practices” is “powerful evidence of animus,” especially when those unfair labor practices were committed against the same employees who are now complaining of discrimination. *Northfield Urgent Care, LLC & Jennifer Grossman*, 358 NLRB No. 17 (Mar. 15, 2012); *see also Waste Management of Arizona*, 345 NLRB 1339, 1341 (2005) (employer’s contemporaneous commission of unfair labor practices against employee alleging discrimination sufficient to support finding that antiunion animus was motivating factor in discharge decision); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), *enfd.* 519 F.3d 373 (7th Cir. 2008).

In *Hotel Bel-Air*, 358 NLRB 1527, 1530 (2012), adopted by *Hotel Bel-Air*, 361 NLRB 898 (2014), *enfd. Hotel Bel-Air v. NLRB*, 637 Fed.Appx. 4 (D.C. Cir. 2016), the Board determined Respondent Hotel Bel-Air violated §§ 8(a)(5) and (1) of the Act by unilaterally implementing its “last, best, and final” during its negotiations with the Union regarding the impact of the Hotel’s closure on bargaining unit employees. In so doing, the Respondent effectively circumvented employees’ collective bargaining representative, and made direct offers of monetary severances to employees in exchange for a complete waiver of their right to reinstatement to their prior positions at the Hotel Bel-Air.

The specific nature of the Respondent’s unfair labor practice in the prior Bel-Air case provides particularly strong evidence of animus towards its unionized former employees. The Respondent’s prior conduct goes far beyond merely showing generalized hostility towards union supporters or their protected activity. Rather, by its unlawful implementation in 2010, the Respondent sought to achieve the same object as it did with its discriminatory hiring the following year in 2011—to prevent a majority of its unionized workforce from returning to the

Hotel, so that it could operate its remodeled property without having to bargain with the Union.<sup>6</sup> Having failed in its unlawful maneuver to trick or bribe employees into accepting a severance package which their bargaining representatives had not approved in negotiations, the Respondent decided to achieve the same aim by other means, i.e. simply not rehiring the former workers when they applied for their old jobs.

**b. Direct evidence of Respondent's antiunion animus was established at hearing.**

Direct evidence offers perhaps the strongest proof of an employer's antiunion animus. One of the Respondent's key management witnesses conceded that union avoidance was one of the Hotel's post-renovation goals. Additional direct evidence was introduced at Hearing in the form of a Company document that specified a "union action plan" as part of the preparation for the reopening of the Hotel.

Sandra Arbizu served as Respondent's Human Resources Manager at the Hotel Bel-Air during the Hotel's rehire process in 2011, and was in charge of setting up the hiring fair and application process in preparation for the reopening of the Hotel. (Tr. 1859-61 [Arbizu].) During this timeframe, Arbizu reported to Milet Lukey as her superior. (Tr. 1861-63 [Arbizu].)

On cross-examination by the Union's Counsel regarding the Respondent's preparations, Arbizu testified as follows:

Q: Were any preparations made upon re-opening for you to deal with the Union upon re-opening?

A: Yes.

Q: What were -- what were the preparations of that?

A: I guess when you -- when you say "preparation", is -- what I mean by that is that we do training on being good managers, following good practices. We do training on getting people engaged. We want to have meetings -- department meetings. We want to make sure that we provide a clean and healthy break room, cafeteria. That we work at making sure they have uniforms, all of this, for us, is preventative kind of work that we do to educate our managers so that your employees do not need a third party to speak for them, that they can come and talk to you. We have an open-door policy. So things like that.

Q: Great.

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<sup>6</sup> As noted above at pp. 18-20, the Respondent was compelled to recognize and bargain with Local 11 irrespective of the composition of its post-hiatus workforce; whether or not the Respondent based its actions on a misapplication of the Board's successorship principles or simply sought to undermine the Union's majority support following the renovation, its clear intent was to rid itself of the Union.

A: Of that nature.

Q: So in other words, taking, as you put it, preventative measures to make sure that a Union doesn't need to come, or they don't need to be represented by a Union, because those things are being taken care of?

A: Well, yeah. To be good managers, to be good people to their staff.

Q: That was part of training that you conducted in preparation for the re-opening that you --

A: I didn't conduct it, but it was training that was done for us.

Q: But that was training that was conducted in preparation --

A: Yeah.

Q: -- to the re-opening?

A: For us.

(Tr. 1906-07 [Arbizu].)

In the foregoing exchange, Arbizu freely and directly admitted that the Respondent conducted detailed union avoidance training for Hotel Bel-Air managers as part of its preparations for the reopening, describing various measures as “preventative kind of work that we do to educate our managers so that your employees do not need a third party to speak for them.” In context, the “third party” in question is obviously a labor organization.

Along similar lines, Abrizu admitted that former Hotel General Manager Tim Lee was not included in the final interview process as would typically be the case “because there was the idea that he would be able to say no to someone because they had worked there prior,” thereby acknowledging both the presence of animus towards former employees on the part of decisionmakers and the Respondent’s concern about avoiding the *appearance* of discrimination. (Tr. 1894 [Arbizu].)

Arbizu’s damaging testimony is confirmed by GC Exhibit 56, a checklist of items related to the Hotel’s reopening process which the Respondent produced in response to a subpoena. The list included a “union action plan,” which likely refers to the same type of “preventative” measures described by Arbizu on the witness stand. (Tr. 2673-76, GC Ex. 56.)

Additional witnesses confirmed that Respondent's managers were, at minimum aware of a significant ongoing labor dispute between the Dorchester Collection, Hotel Bel-Air and the Union in 2011. (Tr. 1714 [Boggs], 1905 [Arbizu], 1772-73 [Oken].) While this does not, on its own, establish antiunion hostility on their part, it does lead to an inference that the history of the dispute influenced managers' decision-making and attitudes towards union-member former employees seeking to return to their jobs, and presumably to bring the Union back with them. This viewpoint was likely further reinforced by the Respondent's union avoidance training.

**c. Respondent's animus is evidenced by the dramatic statistical disparity in its hiring of former employees.**

The Board has recognized that statistical disparities in hiring can be probative evidence of a employer's antiunion animus and motivation. In *Glenn's Trucking Co.*, 332 NLRB 880 (2000), the Board endorsed the ALJ's reliance on statistical evidence in finding that the employer had discriminated against union members in its hiring of applicants:

We agree with the judge that "the possibilities of the Respondent's lawfully filling [the remaining] vacancies without hiring one employee on the Union's 'Preferential Hiring List' are, at minimum, statistically remote," and his further finding that "the extreme [Union versus non-Union hiring] ratios clearly demonstrate animus against the employees whose names had appeared on the Union's 'Preferential Hiring List.'" The judge implicitly found a "blatant disparity" in the Respondent's treatment of applicants. In these circumstances, the statistical evidence can be used as an element of animus. In addition, we are satisfied that the General Counsel has established the falsity of the Respondent's contention that the discriminatees were unqualified or less qualified than the employees the Respondent hired and that they had been passed over during an "honest random selection process."

*Glenn's Trucking*, 332 NLRB at 880.

At Hearing, the parties introduced convincing evidence that the Respondent's hiring was statistically skewed against former employee applicants, particularly in light of their extensive qualifications and strong work records.

In total, 176 former employees applied for their job positions. Of these, only 24 were ultimately hired by the Respondent, a total of about 14%. (*See above* p. 8.)

Further, as discussed below, at least 64 former employee applicants (or at least 36%) who participated in the Respondent's hiring fair were not advanced beyond the Initial Conversation stage of the interview process, with many applicants removed from consideration without explanation, or for plainly pretextual reasons.

The likelihood that the Respondent excluded such a high percentage of qualified former employee applicants by mere chance in the course of a neutral hiring process is, to use the Board's phrasing, "statistically remote."

**d. Respondent's pretextual hiring fair presents numerous inconsistencies and problems which demonstrate bias against former employees.**

Respondent's primary defense upon which the Respondent relied at Hearing was its purportedly neutral hiring process. The Respondent presented extensive and detailed testimony regarding its application process and hiring fair through numerous management witnesses. However, the Respondent's assertion that its hiring process was not tainted by animus against former Hotel employees and their Union is flatly contradicted by documentary evidence and the testimony of Respondent's own witnesses. Taken together, these show numerous inconsistencies and problems which demonstrate a pattern of bias against former employees in the Respondent's hiring of its workforce.

**i. Special Interview Period for Former Employees**

While the Respondent insisted at the Hearing that it disregarded applicants' status as former employees in its hiring decisions, it failed to explain a glaring anomaly in the structure of its job fair: that it designated the morning of the first day of the fair, 9:00 a.m. to 12:30 p.m. on July 26, as the special period during which former employees were instructed to apply. (*See* above p. 5.) The Respondent's decision to separate this group of applicants from all others establishes, at minimum, that the Respondent was conscious of and attentive to former employment at the Hotel Bel-Air as a selection criterion. Nor did the Respondent offer any benign explanation for its decision to group former employees together in one concentrated window of time at the start of its hiring process.

Viewed in the overall context of the instant case and the foregoing evidence of animus, the most probable explanation is that the Respondent deliberately grouped former employees in order to more efficiently identify them, and screen them out from the applicant pool up front.

**ii. Initial Conversations**

As described above, at least 64 former employee applicants (at least 36%) did not get past the first stage of the first Initial Conversation stage of the Respondent's hiring fair, of whom approximately 42 (65%) had worked at the Hotel for at least 5 years, and approximately 29 (45%) had worked at the Hotel for at least 10 years. (*See* above p. 8.)

These former employees' length of service is dramatically at odds with the reasons for rejection which their screeners marked on their interview forms. Numerous employees, many of whom had been employed at the Hotel for decades (e.g. Joaquin Fuentes, Jose Gaeta, Martin Orozco), were excluded from consideration following their Initial Conversation with markings of "poor communication skills" or "lack hospitality/communication skills." (*See* above p. 9.) It is apparent that these long-service employees, many of whom worked in the back-of-the-house positions requiring little to no guest interaction, possessed sufficient communication skills to perform their jobs successfully, and the Respondent failed to explain why its renovation of the Hotel's facilities now rendered them inadequate.

Further, many former employees who received positive or satisfactory evaluations in their Initial Conversation were nonetheless inexplicably removed from consideration at the first stage of the hiring fair. Interviewer Khoi Luevano positively evaluated former employee applicants Carmen Casiano, Irma Zavala, Ana Arrazola, and Carlos Burgos, all of whom had worked at the Hotel for between 10 and 20 years. All four employees were nonetheless eliminated from consideration, for reasons which neither Luevano nor any other Respondent witness was able to adequately explain.

While the Respondent attempted to characterize the Initial Conversations as a friendly first engagement where positive, hospitality-oriented candidates were identified, for former employees it functioned as the first stage of a cynical culling process. Numerous applicants were either mischaracterized as unqualified in spite of their years or decades of experience based on a cursory interaction, or managed to earn a positive evaluation only to have their application subsequently removed from consideration.

Further, though the Respondent sought to portray the job fair as a streamlined process where independent decisions were made at each of the three stages by the interviewer, in response to questioning by the Administrative Law Judge, Luevano stated that Milet Lukey was responsible for extracting applicants interview forms after they had been sorted into "yes" and "no" boxes following the Initial Conversation stage. (*See* above p. 7.) Arbizu also confirmed that applications were placed in a "holding area" between stages of the interview process. (Tr. 1912 [Arbizu], *see* above p. 7.) As a result, senior managers more closely involved in achieving the Respondent's antiunion aims and with greater capacity to track the hiring or rejection of

former employees were able to monitor the Initial Conversations and intervene in the selection process as necessary.

### **iii. Departmental Interviews**

As described above, the second Departmental Interview stage of the hiring fair exhibited even more extensive inconsistencies and unjustified or summary rejections of former employee applicants.

#### **a. Summary rejections**

A significant percentage of former employees who made it to the second stage were summarily rejected by interviewer Andrey Godzhik. (*See* above pp. 10-12.) Godzhik's name or initials appear on a plurality of former employee interview forms where a departmental interviewer is indicated, a total of 37. Of these, Godzhik rejected 31, or about 83%. Godzhik frequently failed to write down applicants' answers to the interview questions he asked or make any other notation on employees' interview forms other than the reason for rejection, violating the Respondent's stated interview protocol and leaving unclear whether or not he even bothered interviewing many of the candidates he excluded from consideration. (*See* Tr. 532-33 [Lukey]; above p. 15.) The reasons Godzhik did provide for his rejections were generally at odds with the former employee applicants' qualifications and/or their prior evaluation at the Initial Conversation stage. He summarily excluded veteran former employees who had received excellent evaluations on their communication based on "lack of hospitality/communication skills" (e.g. Emilio Molina, Joseph Nava), and marked former employees with consistent tenures of over 10 or 20 years at the Hotel Bel-Air as having "unacceptable job stability" (e.g. Tomas Alvarado, Oscar Martinez, Elizabeth Bono). (*See* above p. 10-12.)

In spite of the highly significant role Godzhik played in eliminating former employee applicants from consideration at the Departmental Interview stag of the hiring fair, the Respondent elected not to present him as one of its many interviewers and management witnesses at the Hearing. The most logical conclusion is that Respondent knew that Godzhik would be unable to explain or justify his obvious selection bias against former employees. Rather than expose Godzhik to uncomfortable and damaging cross-examination before the Administrative Law Judge, the Respondent preferred to omit him from its job hiring narrative entirely, which can only lead to a negative inference.

While Godzhik was responsible for the greatest number of summary rejections, other Departmental Interviewers excluded qualified former candidates in the same manner, marking explanations for rejection which were plainly contradicted either by the applicants work history, or their evaluation at the previous stage of the fair. (*See* above p. 12.)

**b. Inconsistent standards**

Respondent's managers who conducted Departmental Interviews for the Hotel's Wolfgang Puck-licensed food and beverage operation presented contradictory accounts of the criteria by which they evaluated candidates and demonstrated clear disparities in their evaluation of former employee applicants' qualifications. Departmental interviewers Tracey Spillane and Edward "Sonny" Sweetman gave conflicting explanations regarding their basis for selecting candidates, with Spillane emphasizing "positive attitude" and noting that training would be provided for new hires on the job, and Sweetman underscoring the need to hire trained candidates with the best background working in chef-driven kitchens. (*See* above p. 12.)

Further, when a given set of criteria was actually used to evaluate job candidates, Respondent's managers applied them inconsistently to former employee applicants and new hires, with a clear bias against the former. Sweetman, who emphasized the importance of applicants' background and work experience, rejected an experienced former employee with a culinary school degree (distinguishing "culinary school" from "work experience"), but recommended for hire a non-former employee applicant whose prior work experience was at a retail pharmacy, justifying his decision in part on the basis that she had attended culinary school. (*See* above pp. 12-13.)

Claiming that he demanded specific and detailed answers to interview questions, Sweetman confirmed on the stand that he rejected former employee applicant Jaime Bravo for providing "general answers," but readily approved for hire non-employee applicants whom he recorded as having provided extremely generalized or amateurish responses to his question. (*See* above p. 13.)

Similarly, Sweetman punctiliously required absolutely complete application forms from former employee candidates, rejecting a number of them for failing to check particular boxes or omitting a particular box on their form, while applying a far more lenient standard to non-former employees, whom he recommended for hire in spite of similar or even identical omissions. (*See* above pp. 13-14.)

Such clear disparate treatment directed against former employees is probative evidence of the Respondent's antiunion animus.

**iv. Additional problems with the hiring fair**

In addition to the foregoing, the job fair was plagued by a number of additional problems and inconsistencies, which further undermine the Respondent's account of an orderly, neutral hiring process.

According to the normal procedure described by Respondent's witnesses, employees who successfully passed the Initial Conversation stage of the hiring fair should have promptly received a Departmental Interview on the same day. In actual practice, some former employee applicants completed their Initial Conversation and were kept in limbo, only receiving an invitation to come for a Departmental Interview after a substantial period of time had passed. In other cases, a former employee applicant who was initially rejected was subsequently "raised from the dead" and called back to be hired after weeks had elapsed. (*See* above p. 14-15.) Such inconsistencies strongly indicate that the Respondent monitored, controlled, and intervened to modify the number of former employees it hired, in essence "padding the numbers" in order to avoid a facially undeniable appearance of discrimination.

Additional anomalies were established at trial with respect to interviewers' usage and marking of applicants' interview forms, which form the documentary record of the Respondent's hiring process. Respondent asserted that managers were trained to use the forms in a consistent manner, and were instructed to only make marking on their respective section of the form (i.e. Initial Conversation, Departmental Interview, etc.) and to write down applicants' responses to their interview questions. (Tr. 532-33 [Lukey]; R Ex. 5; *see* above pp. 6-7.) However, a number of interviewers evidently flaunted this rule, frequently making notations in the wrong section or failing to write down applicants' responses, thereby undermining the Respondent's ability to account for its hiring decisions and prove that they were made in a manner free from anti-union bias. (*See* above pp. 15-16.)

Finally, the Respondent's efforts to resolve the obvious contradiction between its purported effort to hire well-qualified applicants, and its mass rejection of long-serving former employees who had performed the same jobs, resulted in a tangle of conflicting testimony from management witnesses regarding the significance of employees' former work experience at the Hotel Bel-Air. Most critically, after presenting the emphatic testimony from Lukey and Arbizu

that employees' prior work records were given absolutely no consideration due to the dramatic change in the Hotel's operations following its remodeling, the Respondent veered sharply in the opposite direction with the testimony of Maria Rangel, who claimed that she advocated for the hiring of former employees based on her experience working with them prior to the closure, and considered their qualifications sufficient on that basis. (*See above pp. 16-17.*)

The Board has held in prior cases that such shifting defenses and conflicting accounts of an employer's motivations support an inference of animus. *See Network Dynamics Cabling, Inc.*, 341 NLRB 735, 746 (2004) ("This apparent shift in Respondent's explanation for not hiring or considering for hire the four alleged discriminatees, from that first proffered by [manager] in his statement to the Board to that raised by Respondent at the hearing and on brief, supports an inference that neither explanation is a truthful one and that the real reason is one which the Respondent seeks to conceal"), citing *Doug Wilson Enterprises, Inc.*, 334 NLRB No. 51 (2001), *Lucky Service Company*, 292 NLRB 1159, 1167 (1989).

**5. The Respondent has failed to show that it would not have hired former employee applicants even in the absence of animus against them.**

The Respondent has failed to establish that it would not have hired its former employee applicants irrespective of their status as former employees and union members and even absent its animus towards them. The Respondent's assertion that it conducted a purportedly neutral hiring fair was its attempt to establish this defense, and to demonstrate that its ultimate hiring decisions were the product of an orderly interview process free from antiunion bias, i.e. that the same hiring decisions would have been made even if the discriminatees were not former employees. However, for the reasons discussed above, the Respondent's hiring fair defense is not sustained by the evidence established at Hearing, and must therefore fail.

For all of the foregoing reasons, the Respondent has discriminated in rehire against its former and has violated §§ 8(a)(3) and (1) of the Act.

#### **IV. CONCLUSION**

For the foregoing reasons, the Charging Party submits that Respondent violated Sections 8(a)(3), (5), and (1) of the Act.

Dated at Los Angeles, California, this November 9, 2018.

Respectfully submitted,

/s/ Kirill Penteshin\_\_\_\_\_

Kirill Penteshin

Charles Du

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# Appendix A

## Summary of Selected Applicants and Hiring Outcomes

Exhibit	Name	Former HBA Employee	IC	DI	FI	Job Offer	Outcome
GC 2 p. 497	Amanda Escobar	Y	LD	-	-	N	IC "poor communication skills"; no DI; worked at HBA for 22 years
GC 2 p. 441	Joaquin Fuentes	Y	SA	-	-	N	"Lack hospitality/communication skills" marked in DI section during IC; worked at HBA for 27 years
GC 2 p. 76	Jose Gaeta	Y	SA	-	-	N	IC "no evidence of self confidence," "appeared uncertain," "poor communication skills"; no DI; worked at HBA for more than 20 years
GC 2 p. 319	Martin Orozco	Y	SA	-	-	N	IC "lack hospitality/communication skills," "incomplete application," "basic experience, training needed"; no DI; worked at HBA for 23 years
GC 2 p. 254	Carmen Casiano	Y	KEL	-	-	N	Good IC; no DI; worked at HBA for 22 years
GC 2 p. 481	Irma Zavala	Y	KEL	-	-	N	Good IC; no DI; worked at HBA for 20 years
GC 2 p. 489	Ana Arrazola	Y	KEL	-	-	N	Good IC; no DI; worked at HBA for 13 years
GC 2 p. 109	Carlos Burgos	Y	KEL	-	-	N	Good IC; no DI; worked at HBA for 16 years
GC 2 p. 141	Emilio Molina	Y	PC	AG	-	N	Good IC; DI no comments except "Lack hospitality/communication skills"; worked at HBA for 30 years
GC 2 p. 221	Joseph Nava	Y	PC	AG	-	N	Good IC; DI no comments except "Lack hospitality/communication skills"; worked at HBA for 9 years
GC 2 p. 145	Tomas Alvarado	Y	ML	AG	-	N	Good IC; DI no comments except "Unacceptable job stability"; worked at HBA for 25 years
GC 2 p. 113	Oscar Martinez	Y	JM	AG	-	N	Good IC; DI no comments except "Unacceptable job stability"; worked at HBA for 10 years
GC 2 p. 373	Elizabeth Bono	Y	ML	AG	-	N	Good IC; DI no comments except "Unacceptable job stability"; worked at HBA for 12 years
GC 2 p. 54	Julio Cruz	Y	JM	TS	-	N	Good IC; DI positive but marked "Basic experience, training needed"; worked at HBA for 22 years
GC 2 p. 41	Roberto Dominguez	Y	ML	ND	-	N	Good IC; DI no comments except "Lack hospitality/communication skills"; worked at HBA for 3 years
GC 2 p. 63	Anthony Pham	Y	PC	SS	-	N	Good IC; DI no comments except "1" marking indicating failing to meet minimum qualifications of skills and experience; attended culinary school; former HBA employee
GC p. 1195	Yesenia Gonzalez	N	?	SS	SS	Y	Non-former employee; hired despite having no food service work experience
GC 2 p. 331	Jaime Bravo	Y	PC	SS	-	N	Good IC; rejected at DI stage because answers to questions were not specific enough; worked at HBA for 4 years
GC 2 p. 817	Chau Nguyen	N	?	SS	SS/CM	Y	Non-former employee; hired despite simplistic answers to DI questions
GC 2 p. 731	Sidue Dukemajian	N	SS	SS	?	Y	Non-former employee; hired despite simplistic answers to DI and FI questions
GC 2 p. 157	Pedro Sanchez	Y	JM	SS	-	N	Good IC; rejected at DI stage in part because of partially incomplete application; worked at HBA for 10 years
GC p. 578	Ronald Harling	Y	PC	TS	-	N	Good IC; rejected at DI stage due to "incomplete application," but only professional references were missing; worked at HBA for 4 years
R 62	Maria Peralta	N	?	?	?	Y	Non-former employee; hired despite not listing professional references on her application form
R 48; R 49	Julio Aleocer	N	ND	ND	CM	Y	Non-former employee; hired despite substantially incomplete application form
GC 2 p. 568	Eluterio Urbina	Y	ML	AG	CM	Y	IC at hiring fair; DI not until 8/5/11 (week after hiring fair finished); FI on 8/12/11
GC 2 p. 359	Lucinda Landers	Y	ML	AG	CM	Y	Andrey Godzhik rejected her at DI stage; still given FI and given job offer on 8/10/11
GC 2 p. 175	Maria Torres	Y	PC	AG/MB	CM	Y	Summarily rejected by Andrey Godzhik at DI stage; given another DI interview with Maria Bonomo and given job offer on 8/24/11
GC 2 p. 477	Maria del Cid	Y	LD	-	-	N	Good IC evaluation yet IC interviewer marked "incomplete application" in DI section; worked at HBA for 19 years
GC 2 p. 237	Higinio Castellon	Y	LD	-	-	N	IC interviewer marked "Lack hospitality/communication skills" in DI section; worked at HBA for 24 years; applying for linen attendant position
GC 2 p. 627	Maria Lourdes Nolasco	Y	LD	-	-	N	IC interviewer marked "Lack hospitality/communication skills" and "Incomplete Application"; worked at HBA for 22 years; applying for room attendant position
GC 2 p. 270	Jose Pinedo	Y	SA	-	-	N	IC interviewer marked "Lack hospitality/communication skills"; worked at HBA for 26 years; applying for engineering position
GC 2 p. 453	Antonio Diaz	Y	JM	AG	-	N	Good IC; DI no comments except "Does not possess minimum experience/skills requirements"; worked at HBA for 23 years
GC 2 p. 547	Rigoberto Contreras	Y	JM	AG	-	N	Good IC; DI no comments except "Lack hospitality/communication skills"; worked at HBA for 25 years
GC 2 p. 385	Raymundo Avina	Y	JM	AG	-	N	Good IC; DI no comments except "Lack hospitality/communication skills"; worked at HBA for 14 years
GC 2 p. 465	Victor Pacheco	Y	JM	SS	-	N	Good IC; DI no comments except "Lack hospitality/communication skills"; worked at HBA for 28 years; applying for dishwasher position
GC 2 p. 469	Alex Barrios	Y	JM	-	-	N	Good IC; no DI; worked at HBA for 9 years
GC 2 p. 298	Salvador Maldonado	Y	KEL	AG	-	N	Good IC; DI no comments except "Does not possess minimum experience/skills requirements"; worked at HBA for 25 years
GC 2 p. 50	Jeremias Del Cid	Y	LD	-	-	N	Good IC; no DI; worked at HBA for 23 years

#### Abbreviations

LD	Louise Drohan	IC
SA	Sandra Arbizu	DI
KEL	Khol Evans Luevano	FI
PC	Porfirio Camaal	
ML	Maria "Milet" Lukey	
JM	Jonathan Mattis	
SS	Edward "Sonny" Sweetman	
TS	Tracey Spillane	
CM	Christoph Mojte	
AG	Andrey Godzhik	
MB	Maria Bonomo	

Identification of interviewer initials and signatures on interview forms with names of hiring fair managers is based on Maria "Milet" Lukey's testimony (GC Exh. 2 pp. 554-59) and the testimony of hiring fair managers and applicant who received interviews.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF ADMINISTRATIVE LAW JUDGES**

KAVA HOLDINGS, LLC., et al.,  
d/b/a HOTEL BEL-AIR

and

31-CA-074675

UNITE HERE - LOCAL 11

**CHARGING PARTY'S MOTION REQUESTING PERMISSION TO FILE ITS POST-  
HEARING BRIEF AFTER THE DUE DATE**

The due date for post-hearing briefs in the above-captioned case, following multiple mutual requests for extension of time, was November 9, 2018. The Charging Party attempted to file it using the Board's E-Filing system on the evening of November 9. In accessing the Board's website to file its brief, the Charging Party learned that the Board's E-Filing system was down from 11:00 p.m. ET November 9 until noon on November 13. The Charging Party promptly sent the Administrative Law Judge and the parties a true and correct copy of its brief by electronic mail with an explanation of the circumstances. The foregoing facts are attested to in the attached Declaration of Charging Party Counsel Kirill Penteshin. (Exhibit A.) The Charging Party is now E-Filing its Post-Hearing on the morning of November 13. Pursuant to §102.2(d)(2) of the Board's Rules and Regulations, the Charging Party requests permission to file its Post-Hearing Brief.

For all of the foregoing reasons, the Charging Party respectfully requests that its motion be granted.

//

Dated: November 13, 2018.

Respectfully submitted,

/s/ Kirill Penteshin

Kirill Penteshin

General Counsel

UNITE HERE Local 11

464 S. Lucas Ave. Ste. 201

Los Angeles, CA 90017

## **Exhibit A**

**DECLARATION OF KIRILL PENTESHIN**

I, Kirill Penteshin, declare:

1. I serve as General Counsel for UNITE HERE Local 11, the Charging Party in case 31-CA-074675 *Kava Holdings, LLC, et al. d/b/a Hotel Bel-Air*.
2. On November 9, 2018 at approximately 11:40 p.m., with the assistance of Local 11 staff attorney Charles Du, I attempted to utilize the NLRB's E-Filing system in order to file the Union's Post-Hearing Brief.
3. In accessing the NLRB's website, I learned that the Board's E-Filing system was unavailable due to system maintenance until noon ET on November 13, 2018.
4. I emailed Administrative Law Judge Thompson, Counsel for the General Counsel, and Counsel for the Respondent, a true and correct copy of the Charging Party's Post-Hearing Brief, and an explanation of the circumstances at 11:47 p.m. on November 9. A copy of this email is attached to this declaration as Declaration Exhibit A.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 13th day of November, 2018 at Los Angeles, California.



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Kirill Penteshin  
General Counsel  
UNITE HERE Local 11

**Declaration Exhibit A**

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## 31-CA-074675 Hotel Bel-Air - Charging Party's Post-Hearing Brief

1 message

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**Kirill Penteshin** <kpenteshin@unitehere11.org>

Fri, Nov 9, 2018 at 11:47 PM

To: "Thompson, Lisa D." <Lisa.Thompson@nlrb.gov>

Cc: "Palencia, Yaneth" <Yaneth.Palencia@nlrb.gov>, "Gancayco, Simone" <Simone.Gancayco@nlrb.gov>, "Arch Y. Stokes" <astokes@stokeswagner.com>, "Karl M. Terrell" <kterrell@stokeswagner.com>, Diana Dowell <ddowell@stokeswagner.com>, Charles Peng Du <cdu@unitehere11.org>

Dear Judge Thompson and Counsel:

The Charging Party is attempting to E-File its brief ahead of our Nov. 9 11:59 PM filing deadline, but has just learned that the NLRB's E-Filing system is down. We are submitting our brief by electronic mail and will E-File once the system is restored, or by any other means Your Honor instructs. We apologize for the form of this submission.

Sincerely,  
Kirill Penteshin

--

Kirill Penteshin

General Counsel  
UNITE HERE Local 11  
464 South Lucas Ave, Suite 201  
Los Angeles, CA 90017  
Tel.: 213-481-8530 x258  
Fax: 213-481-0352  
Cell: 301-602-4026

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### 2 attachments



**Union's Post-Hearing Brief 31-CA-074675.pdf**  
413K



**E-File Service Down.pdf**  
251K

### **CERTIFICATE OF SERVICE**

On November 13, 2018, I filed the attached Charging Party's Post-Hearing Brief and Motion Requesting Permission to File its Post-Hearing Brief after the Due Date using the NLRB's E-filing system. I subsequently served the following parties by electronic mail:

Arch Stokes  
Stokes Wagner  
One Atlantic Center, Suite 2400  
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I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on November 13, 2018, at Los Angeles, CA.

/s/ Kirill Penteshin  
KIRILL PENTESHIN